



August 30, 2000

Ms. Daisy A. Stiner
Executive Director
Texas Department Of Housing and Community Affairs
P.O. Box 13941
Austin, Texas 78711-3941

OR2000-3372

Dear Ms. Stiner:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 138469.

The Texas Department of Housing and Community Affairs (the "department") received three requests for information concerning certain program awards. You indicate that the department has released portions of the information that is responsive to the two requests about the 2000 Housing Trust Fund applications. The specific information you seek to withhold is the multifamily credit underwriting analyses of three award applicants, St. John Colony Neighborhood Association ("St. John"), Heatherwilde Park Limited Partnership ("Heatherwilde") and Harbor Lights Residents Council ("Harbor Lights"). You claim that the requested information is excepted from disclosure under section 552.104 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

For the St. John and Harbor Lights information, we must dismiss the department's section 552.104 claim on procedural grounds. For these two requests, the department failed to timely submit to this office its request for an open records ruling. See Gov't Code § 552.301. Although some exceptions to disclosure are not defeated when untimely raised, that is not the case for section 552.104. Section 552.104 is waived when not raised within the ten-day deadline. See Open Records Decision No. 592 at 8 (1991); Gov't Code § 552.302 (demonstrated compelling need to withhold information may overcome procedural shortcomings). Accordingly, the department must release the information concerning St. John and Harbor Lights to the requestors.

We turn to the Heatherwilde Park information. Heatherwilde applied for funding from the HOME program. Section 552.104 states that:

Information is excepted from the requirements of Section 552.021 if it is information that, if released, would give advantage to a competitor or bidder.

The purpose of this exception is to protect the interests of a governmental body usually in competitive bidding situations. *See* Open Records Decision No. 592. This exception protects information from public disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Generally, section 552.104 does not except bids from public disclosure after bidding is completed and the contract has been awarded. *See* Open Records Decision 541 (1990).

In the situation at hand, developers seek program funds for a housing project. You explain that once the department receives an application for program funding, the application is scored in accordance with the program rules and underwritten for feasibility. You go on to explain that when the scoring and underwriting for the applications are completed, the department staff makes its recommendation to the board. You argue that the information at issue

is protected from disclosure prior to the awarding of [department] program awards in that the release of the credit underwriting analysis during this competitive time would interfere with [the department's] process in fairly and equitably awarding program funds. During the period before [the department's] board awards the program funds, the application process is still competitive and releasing the requested information would necessarily result in an advantage to certain applicants at the expense of others and would be detrimental to the public's interest.

We conclude that the department has not established the applicability of section 552.104 to the information at issue. The department has not explained how the release of Heatherwilde's underwriting analysis would give an advantage to other applicants for HOME grant awards or otherwise shown how the department's interest in awarding program funds would be harmed by the release of the information. Accordingly, the department may not withhold the information from the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited

from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kay H. Hastings
Assistant Attorney General
Open Records Division

KHH/ljp

Ref: ID# 138469

Encl. Submitted documents

cc: Mr. Gilson Westbrook
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